IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TAMARA SEECK,	)	
	)	
Appellant,	)	
	)	No. ED 86973
v.	)	
	)	
GEICO INSURANCE,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF THE COUNTY OF ST. CHARLES
ELEVENTH JUDICIAL CIRCUIT

The Honorable Ted House

BRIEF OF APPELLANT TAMARA SEECK

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TABLE OF CONTENTS

TABLE OF CASES

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by the Circuit Court of St. Charles County, Missouri, Division 1, 11th Judicial Circuit. This Court has jurisdiction of the appeal under Article V Section 3 of the Constitution of the State of Missouri, in that none of the grounds of exclusive jurisdiction of the Supreme Court of Missouri as set forth therein are present. This Court has jurisdiction to hear this appeal because it is an appeal from the St. Charles County Circuit Court, which is within the geographic boundaries of the Eastern District of the Court of Appeals. R.S.Mo. § 477.050 (2001).

For the convenience of the Court, the parties will be referred to by their trial designation.

STATEMENT OF FACTS

On December 10, 1999, Plaintiff Tamara Seeck ("Seeck") was a passenger in a motor vehicle driving Eastbound on U.S. Highway 40, which was struck in the rear by a motor vehicle being driven by Kelli Whitmore (LF 042, LF 009). As a result of this collision, Plaintiff sustained serious injuries to her cervical spine (LF 009). Sections C6 and C7 of Plaintiff's spine were ruptured and the injuries required significant medical care and attention, including cervical surgery (LF 043, LF 009). In addition, Seeck experienced soft-tissue damage and arthritis as a result of the accident, incurring approximately $44,000.00 in medical bills (LF 009). Her injuries are permanent, chronic, progressive and have interfered with her ability to lead a normal, pain-free life (LF 009).

The December 10, 1999 accident was caused by the negligence of Kelli Whitmore, who was insured with Farmers Group under a $50,000.00 liability policy (LF 009). Farmers Insurance Group tendered and Seeck accepted the policy limits of $50,000.00 on the Whitmore policy (LF 009). Upon accepting this settlement from Farmers, Seeck singed a Release in Full of All Claims and Rights ("Release"), which stated:

> I hereby agree to reimburse and indemnify all released parties for any amounts which any insurance carriers, government entities, hospitals or other persons of or organizations may recover from them in reimbursement for amounts paid to me or on my behalf as a result of this accident by way of contribution, subrogation, indemnity, or otherwise (LF 099).

In addition, the Release expressly reserved her right to recover underinsured motorist benefits from her own insurance carrier, stating "Release excludes Tamara Seeck's own underinsured Motorist coverage carrier" (LF 099).

At the time of this collision, Seeck was insured with Defendant Geico General Insurance Company ("Geico") (LF 008). In exchange for a standard premium, the terms and conditions of Geico's insurance agreement with Seeck provided for underinsured motorist coverage (LF 063-088). The limit of Seeck's coverage for underinsured benefits was $50,000.00 (LF 065). In addition, the insurance policy contained an "Other Insurance" clause, which stated:

OTHER INSURANCE

When an insured is occupying a motor vehicle not owned by the insured or a relative and which is not described in the declarations of this policy, this insurance is excess over any other insurance available to the insured and the insurance which applies to the occupied motor vehicle is primary (LF 0086).

Since Kelli Whitmore was an underinsured motorist as defined in Geico's policy, Seeck sought recovery from Geico for underinsured motorist coverage pursuant to the policy (LF 008-009). Geico refused Seeck's claim for underinsured motorist coverage, and Seeck filed suit against Geico to recover under the policy. Geico filed a Motion for Summary Judgment, and on August 19, 2005, the Circuit Court for the County of St. Charles, Missouri granted the Motion (LF 151). The parties stipulated that in the event the Court denied the Motion, a judgment for $50,000.00 would be entered in favor of Plaintiff and against Defendant (LF 138, 139). In other words, the parties stipulated that if Seeck is correct and there exists underinsured motorist coverage, then she is entitled to a judgment in the amount of $50,000.00 (LF 138, 139).

On September 20, 2005, Plaintiff timely filed her Notice of Appeal. The Order granting Defendant's Motion for Summary Judgment did not specify on what grounds the

Court decided the case. Therefore, Plaintiff will address each of the basis upon which Defendant sought summary judgment. On appeal, Seeck argues that the Trial Court erred in granting summary judgment in favor of Geico because: (1) Seeck is entitled to underinsured motorist coverage under the policy, (2) Geico was not prejudiced by Seeck's failure to obtain Geico's prior written consent to settle with the tortfeasor, and (3) the settlement and release which was executed by Seeck upon settlement with the tortfeasor did not defeat coverage in this case.

The parties are in agreement that this case is ripe for decision on summary judgment. There are no factual issues. The issues in the case are only issues of law as to whether Plaintiff is entitled to coverage for underinsurance benefits under her Geico policy.

POINTS RELIED UPON

A. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ENTERING JUDGMENT IN FAVOR OF DEFENDANT, BECAUSE THE LANGUAGE OF THE GEICO POLICY CLEARLY PROVIDES THAT THE UNDERINSURED MOTORIST BENEFITS ARE EXCESS TO THE POLICY LIMITS OF THE TORTFEASORS POLICY WITH FARMERS.

Ware v. Geico General Insurance Company, 84 S.W. 3d 99 (Mo.Ct.App. 2002)

B. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ENTERING JUDGMENT IN FAVOR OF DEFENDANT BECAUSE THERE WAS NO SHOWING THAT DEFENDANT WAS PREJUDICED BY PLAINTIFF'S FAILURE TO OBTAIN DEFENDANT'S PRIOR WRITTEN CONSENT TO SETTLE WITH THE TORTFEASOR.

Tegtmeyer v. Snellen, 791 S.W.2d 737, 741 (Mo.Ct.App. 1990)

Mazzocchio v. Pohlman, 861 S.W.2d 208 (Mo.App.E.D. 1993)

Lebs v. State Farm Mutual Automobile Insurance Co., 568 S.W.2d 592 (Mo.App.1978)

Craig v. Iowa Kemper Mutual Insurance Company, 565 S.W.2d 716 (Mo.App. 1978)

C. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ENTERING JUDGMENT IN FAVOR OF DEFENDANT, BECAUSE THE SETTLEMENT AND RELEASE WHICH WAS EXECUTED BY PLAINTIFF UPON SETTLEMENT WITH THE TORTFEASOR DID NOT DEFEAT COVERAGE IN THIS CASE.

Andes v. Albano, 853 S.W.2d 936 (Mo.banc. 1993)

Traveler's Indemnity Co. v. Chunbley, 394 S.W.2d 418, 420 (Mo.App. 1965).

ARGUMENT

A. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ENTERING JUDGMENT IN FAVOR OF DEFENDANT, BECAUSE THE LANGUAGE OF THE GEICO POLICY CLEARLY PROVIDES THAT THE UNDERINSURED MOTORIST BENEFITS ARE EXCESS TO THE POLICY LIMITS OF THE TORTFEASORS POLICY WITH FARMERS.

This Court, in binding precedent, has already determined that the Geico policy language is ambiguous and absolutely provides underinsured motorist coverage for Plaintiff. That case is *Ware v. Geico General Insurance Company,* 84 S.W. 3d 99 (Mo.Ct.App. 2002). The *Ware* case interpreted the very policy at issue in this case, and the exact same policy language was before this Court. In *Ware*, the plaintiff minor was severely injured in an automobile accident and settled with multiple tortfeasors for $125,000.00, exhausting all personal liability coverages of all tortfeasors. As in this case, plaintiff Ware was a passenger in a vehicle being driven by a non-Geico insured. At the time of the accident, the Plaintiff was insured with Geico. The policy contained underinsured motorist coverage provisions with a limit of $100,000.00 per person. The Plaintiff was an insured and covered person under the policy. *Id*. at 100, 101. These are the same basic facts as this case (other than a different policy limit).

The policy language at issue on this appeal is identical to that at issue in *Ware*, and the relevant provisions of the policy were as follows:

LIMIT OF LIABILITY

4. The most we will pay is the amount of damage sustained by an insured for bodily injury less the amount paid to the insured by or for any person or organization who may be held legally liable for bodily injury.

In addition, just like the policy in the *Ware* case, the policy at issue contained an "other insurance" clause. The pertinent portion of that policy language provides:

OTHER INSURANCE

When an insured is occupying a motor vehicle not owned by the insured or a relative and which is not described in the declarations of this policy, this insurance is excess over any other insurance available to the insured and the insurance which applies to the occupied motor vehicle is primary.

Herein lies the conflict and ambiguity that was described in *Ware*. On the one hand, the policy purports to limit UIM coverage to the coverage limits less payments made by the tortfeasor. On the other hand, when the insured is a passenger in a car that they do not own, the Geico UIM coverage is excess. That is, Geico argues that there is no valid underinsured motorist claim because sums paid by the underlying tortfeasor exceed or are at least equal to the underinsured motorist policy limits of the policy at issue. That argument was presented in *Ware*, and it was rejected. The *Ware* Court found that the "Other Insurance" provision of the Geico policy, when compared to the UIM provision, resulted in the policy being ambiguous! Specifically, the Court found that the method for calculating Geico's limit of liability was in conflict with the "Other Insurance" provision, because it was uncertain how the term "excess" in the provision applies to the calculation of coverage. *Id*. at 102, 103. Simply stated, the facts of this case fall squarely within the Other Insurance clause of the policy. Plaintiff was an occupant of a vehicle that was not owned by her or a relative. As a result, the policy was excess. According to the Court, this created an ambiguity. Since the policy was ambiguous it was interpreted against Geico and the Court ordered payment of the

underinsured coverage up to the policy limits of $100,000.00.

Ware mandates the same result here. Plaintiff is entitled to a judgment for $50,000.00. According to *Ware*, the term "excess" and the "other insurance" provisions of the policy could reasonably be interpreted to provide coverage over and above that available from the tortfeasor, and thus the provision was ambiguous. There can be no other conclusion but that the Plaintiff in this case is entitled to underinsured motorist coverage under the policy at issue. This issue has already been decided against Geico, and, at a minimum, basic principles of *stare decisis* mandate a reversal of the judgment and the entry of judgment in favor of Plaintiff.

Judgment for the Defendant on this issue was erroneous, because this same issue has been decided by this same Court, interpreting this exact same policy language. The *Ware* case is the controlling authority, and as a result, Plaintiff is entitled to underinsured motorist coverage.

B. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ENTERING JUDGMENT IN FAVOR OF DEFENDANT BECAUSE THERE WAS NO SHOWING THAT DEFENDANT WAS PREJUDICED BY PLAINTIFF'S FAILURE TO OBTAIN PRIOR WRITTEN CONSENT TO THE SETTLEMENT.

In its Motion for Summary Judgment, Defendant argued that coverage in this case should be defeated because Plaintiff failed to obtain the prior written consent of Geico before entering into the settlement with the underlying tortfeasor. The law in Missouri, however, states that unless the insurer proves that a breach of the consent to settle clause prejudiced its rights, the breach may not serve as a defense to payment under the policy. *Tegtmeyer v. Snellen,* 791 S.W.2d 737, 741 (Mo.Ct.App. 1990). As a matter of law,

Defendant failed to demonstrate any prejudice by Seeck's failure to receive written consent from Geico before settling with the tortfeasor.

In *Tegtmeyer*, after settling with the tortfeasor's carrier for the limits of his $100,000.00 per person coverage, the victims brought an action to declare that their $50,000.00 per person coverage under three automobile policies could be stacked. The Trial Court held that the victims could not collect because they did not obtain consent to settle. The Court of Appeals reversed, however, holding that the insurer was not prejudiced by failure to obtain consent to settle. As in the case at bar, the policy language at issue in *Tegtmeyer* excluded coverage if the insured made a settlement without their prior written consent. This exclusion failed.

Like the insurer in *Tegtmeyer*, it is clear that Geico has not been damaged or prejudiced by Seeck providing the tortfeasor with a release. Seeck couldn't have gotten any more than she did from the tortfeasor and Geico certainly has not been prejudiced in this case since Seeck settled for the policy limits. See *Tegtmeyer*, at 740; *Mazzocchio v. Pohlman*, 861 S.W.2d 208, 211 (Mo.App.E.D. 1993) (Since a settlement was reached for the policy limits, an insurer was not prejudiced by the insured's failure to obtain consent before entering into the settlement agreement, and a "right to consent" clause was ruled unenforceable.) *See also* MAI No. 32.24. Moreover, Defendant Geico made no effort to demonstrate prejudice in the proceedings before the Trial Court. In fact, no evidence or argument asserting prejudice has even been presented.

In addition, when faced with this exact issue – failure to obtain prior written approval of a settlement, Missouri courts have held that a consent to settle clause

impermissibly hinders the mandatory coverage provisions in uninsured motorist cases. *Lebs v. State Farm Mutual Automobile Insurance Co.*, 568 S.W.2d 592 (Mo.App.1978) and *Craig v. Iowa Kemper Mutual Insurance Company*, 565 S.W.2d 716 (Mo.App. 1978). By analogy, the same principle would clearly apply to UIM cases. There is no logical reason to treat UM and UIM cases differently in this area.

Under the law in Missouri, Geico's argument that coverage should be denied because Seeck failed to obtain permission before settling with the tortfeasor fails. First, since Seeck's settlement with Farmers was for the policy limits, there can be no prejudice to Geico, as buttressed by the fact they failed to claim or prove prejudice. Moreover, the mandatory consent to settle clause, as defined in Missouri, impermissibly hinders resolution of cases and must not be used as a sword to providing UIM benefits.

C. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ENTERING JUDGMENT IN FAVOR OF DEFENDANT, BECAUSE THE SETTLEMENT AND RELEASE WHICH WAS EXECUTED BY PLAINTIFF UPON SETTLEMENT WITH THE TORTFEASOR DID NOT DEFEAT COVERAGE IN THIS CASE.

In the lower Court, Geico's final argument was that the release which Plaintiff signed in connection with the settlement with the tortfeasor somehow releases Geico from liability under the underinsured portion of Plaintiff's policy. The challenged release language is as follows:

> I hereby agree to reimburse and indemnify all released parties for any amounts which any insurance carriers, government entities, hospitals or other persons of or organizations may recover from them in reimbursement for amounts paid to me or on my behalf as a result of this accident by way of contribution, subrogation, indemnity, or otherwise.

Geico argued that under the clear terms of the release, Seeck would have to

reimburse the tortfeasor for the amount the tortfeasor was obligated to pay Geico in subrogation. According to Geico, this would result in a "financial wash," making this litigation meaningless. Geico further argued that by signing the release as worded, Seeck created a third-party beneficiary contract, and that Geico is a third-party beneficiary of the release with standing to enforce the release against Seeck and can use the release as a defense to Seeck's claim under the UIM policy.

Geico's argument is without merit, however, because the Release specifically excludes Geico. The Release clearly and unambiguously states, "Release excludes Tamara Seeck's own underinsured motorist coverage carrier." This carrier is Geico. Pursuant to the unambiguous terms of the document, Geico was not released from liability for paying underinsured motorist benefits under the contracted-for policy with Seeck.

In addition, Geico also argued that by signing the Release Seeck created a contract giving Geico third-party beneficiary status, citing *Andes v. Albano*, 853 S.W.2d 936 (Mo.banc. 1993), a case that has nothing to do with liability for UIM benefits. This argument is without merit, because under the law in Missouri, only those third-parties for whose primary benefit the parties contract may maintain an action. *Andes*, at 941. In the case at bar, Geico was not the primary beneficiary of the Release at issue. In fact, the exact opposite is true – Geico was excluded entirely from the Release, which was clearly intended to benefit the released parties, as opposed to a third party. It is somewhat disingenuous to argue that Geico was a third-party beneficiary of the release when the parties expressly carved out an exception to the release reserving the right to pursue the

underinsured motorist claim against Geico. Geico did not benefit from the execution of the Release. Therefore, it is impossible for Geico to be a third-party beneficiary in this situation.

In *Traveler's Indemnity Co. v. Chunbley*, the Court addressed the exact situation at issue on appeal, stating that:

> If a third-party tortfeasor, with knowledge of an insurer's right of action as subrogee, and without the consent of the insurer, settles with the insured, the insurer's right to proceed against such tortfeasor is not effected. In such a case, the primary, wrongdoer, and not the insured, should repay the insurer. Whatever rights the insurer had against the tortfeasor prior to the settlement, the insurer still has. 394 S.W.2d 418, 420 (Mo.App. 1965).

This language is directly on point. Farmers and its insured were represented by competent counsel, and the fact that Plaintiff had a UIM claim to present to Geico was fully disclosed before the signing of the Release. Under the rule of law as set forth in *Travelers,* Geico's rights have not been affected by Plaintiff entering into this release. The parties intended the Release to protect the released parties in the event that there were hospital liens, Medicare liens, Medicaid liens, and the like. The parties did not intend to include Geico, and this is made explicitly clear by the language "Release excludes Tamara Seeck's own underinsured motorist coverage carrier." Geico was unambiguously excluded from the Release, and the Release does not defeat coverage in this case. The release does not create a "financial wash" - Geico is free to seek recovery from tortfeasor and her insurer, and this was contemplated by Farmers when the Release was executed.

CONCLUSION

For the foregoing reasons, the Trial Court erred in granting Defendant's Motion for Summary Judgment and granting judgment in favor of Defendant, and the Trial Court's Order granting Summary Judgment should be reversed, and pursuant to the stipulation of the parties, judgment should be entered in favor of the Plaintiff in the sum of $50,000.00.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of January, 2006, two copies of Appellant's Brief were served on Respondent via first-class United States Mail, postage pre-paid, to:

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_____

CERTIFICE OF COMPLIANCE

By submitting this brief, the undersigned counsel for Appellant hereby certifies the following:

1. this brief conforms with Missouri Rule of Civil Procedure 55.03;
2. This brief conforms with Missouri Rule of Civil Procedure 84.06(b) relating to length;
3. the number of words used in this brief is 3,081.
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By submitting this disk, the undersigned counsel for Appellant hereby certifies the following:

5. this disk conforms with Missouri Rule of Civil Procedure 84.06(a);
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